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No. 83-802

In the Supreme Court of the United States

October Term, 1983

BURLINGTON NORTHERN RAILROAD COMPANY; MISSOURI PACIFIC RAILROAD COMPANY; THE KANSAS CITY SOUTHERN RAILWAY COMPANY; THE KANSAS AND MISSOURI RAILWAY AND TERMINAL COMPANY; UNION PACIFIC RAILROAD COMPANY; ST. JOSEPH AND GRAND ISLAND RAILWAY COMPANY, a subsidiary of Union Pacific Railroad Company; and MISSOURI-KANSAS-TEXAS RAILROAD COMPANY.

Petitioners,

vs.

C. MICHAEL LENNEN, Secretary of Revenue of the Department of Revenue of the State of Kansas; PHILIP W. MARTIN, Director, Division of Property Valuation of the Department of Revenue of the State of Kansas, and THE DEPARTMENT OF REVENUE OF THE STATE OF KANSAS, an administrative agency of the State of Kansas,

Respondents.

COUNTY RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

No legal question is presented for review by the petition for writ of certiorari. The questions proposed in the petition for writ did not form any part of the decisional bases of the opinion of the United States Court of Appeals for the Tenth Circuit nor of the opinion of the United States District Court for the District of Kansas (Hon. Richard D. Roger). That decisional bases, instead, consisted wholly of factual determinations made after hearing and upon conflicting evidence, and which are applicable to only some Kansas railroads and to only the 1982 Kansas 4-R Act case.

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49 U.S.C. § 11503 Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 ..... *passim*

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C. MICHAEL LENNEN, Secretary of Revenue of the Department of Revenue of the State of Kansas; PHILIP W. MARTIN, Director, Division of Property Valuation of the Department of Revenue of the State of Kansas, and THE DEPARTMENT OF REVENUE OF THE STATE OF KANSAS, an administrative agency of the State of Kansas,

Respondents.

COUNTY RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

The County Respondents file this brief in opposition to the petition for writ of certiorari filed by certain railroads from what is hereinafter defined as the Burlington Northern group of Kansas railroads. The County Respondents, having been the County Intervenors below, are the following counties of the State of Kansas: Bourbon, Decatur, Elk, Franklin, Gove, Lane, Linn, Marshall, Miami, Norton, Phillips and Pratt.

STATEMENT OF CASE

This case concerns the amount of Petitioners' liability to the State of Kansas for ad valorem taxes for 1982 as that amount may be affected by Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (the "4-R Act"), codified at 49 U.S.C. § 11503.

Petitioners are five[1] of the eleven railroads which are subject to Kansas ad valorem taxes for 1982.

By two separate actions filed in the United States District Court for the District of Kansas, all of the eleven railroads operating in Kansas sought tax relief under Section 306 of the 4-R Act. Similar cases were filed by the railroads concerning their 1980 and 1981 taxes.

The 1982 suit filed by the Santa Fe group[2] of Kansas railroads sought *equalization* relief under Section 306 of the 4-R Act. Those railways contended that the State Respondents[3] had assessed their property in 1982 at a ratio

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1. At page ii of their petition for writ, Petitioners state "Petitioners . . . are listed in the caption". The caption includes The Kansas and Missouri Railway and Terminal Company. At page 9 of the petition for writ, the listing of "each of the petitioning railroads" excludes the Terminal Company. The District Court's opinion footnoted the fact that the Terminal Company "did not wish to be included with the other railroads seeking a preliminary injunction on the valuation issue". (Petition for Writ, p. 11a). Accordingly, the County Respondents do not consider the Terminal Company to be a Petitioner; they consider only those railroads listed at page 9 of the petition for writ to be Petitioners.

2. The Santa Fe group of railroads consists of: Atchison, Topeka and Santa Fe Railway Company; Chicago and North Western Transportation Company; Chicago, Rock Island and Pacific Company; Kansas City Terminal Railway Company; and St. Louis Southwestern Railway Company.

3. C. Michael Lennen, Secretary of Revenue of the Department of Revenue of the State of Kansas; Philip W. Martin, Director, Division of Property Valuation of the Department of Revenue of the State of Kansas; and The Department of Revenue of The State of Kansas, an administrative agency of the State of Kansas.

of assessed-value-to-true-value (i.e.: 30 percent) which was higher than the ratio on other commercial and industrial property within the State of Kansas (i.e.: 11.7 percent). The Santa Fe group sought an order prohibiting the State Respondents and the County Respondents from assessing or taking any action to collect 1982 taxes based on assessments of the railroads' properties at an assessment ratio higher than 11.7 percent.

The claims made by the Santa Fe group in their 1982 case were identical to the claims made by all eleven Kansas railroads in their respective Kansas 4-R Act suits for 1980 and 1981.

The 1982 suit filed by the Burlington Northern group of Kansas railroads[4] (Petitioners before this Court) included the same *equalization* claims as in the Santa Fe group's case. The Burlington Northern group's suit also included *overvaluation* claims i.e.: claims that those railroads' properties had been valued at more than their actual fair market value. The tax assessments for five of the six railroads in the Burlington Northern group and for several of the railroads in the Santa Fe group had been increased in 1982 over 1980-1981 levels. The Burlington Northern group claimed that that increase resulted in an overvaluation of their properties for tax purposes, and that that increase/overvaluation had been made by the State Respondents in retaliation for the railroads' having received temporary equalization relief in their 1980 cases. The Burlington Northern group in addition sought an order prohibiting the State Respondents and the County

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4. The Burlington Northern group of railroads consists of: Burlington Northern Railroad Company; Missouri Pacific Railroad Company; Kansas City Southern Railway Company; Kansas and Missouri Railway and Terminal Company; Union Pacific Railroad Company including the St. Joseph and Grand Island Railway Company; and Missouri-Kansas-Texas Railroad Company.

Respondents from assessing or taking any action to collect 1982 taxes based upon *valuations* of those railroads' properties which the Burlington Northern group considered excessive.

The Burlington Northern group's 1982 suit was the first time in the history of the Kansas 4-R Act litigation that such *overvaluation* claims have been made by any railroad.

During the period November 23-29, 1982, the District Court heard evidence in the 1982 cases on all of the railroads' motions for preliminary injunction, including all of the railroads' equalization claims and the Burlington Northern group's overvaluation claims for such relief. The witnesses who testified were: Philip W. Martin, Director, Division of Property Valuation of the Department of Revenue of the State of Kansas, a member of the staff of the Division of Property Valuation, and an expert witness for the railroads. The testimony of all three witnesses specifically addressed the Burlington Northern group's overvaluation claims.

By its December 1, 1982 order in the 1982 case, the District Court granted *equalization* relief to all of the railroads. Specifically, the District Court temporarily enjoined the State Respondents and the County Respondents from assessing or taking any action to collect 1982 taxes based on an assessment of the railroads' properties at an assessment ratio higher than 11.7 percent. All the railroads thus were allowed to pay only 39 percent of their 1982 taxes pending final disposition of the 1982 cases. This temporary equalization relief was identical (subject to minor mathematical adjustments) to the temporary relief which the District Court had granted the eleven Kansas railroads in their respective Kansas 4-R Act cases for 1980 and 1981.

By its December 1, 1982 order, the District Court denied *overvaluation* relief to the Burlington Northern group. The District Court first ruled that Section 306 of the 4-R Act did not reach overvaluation issues absent a showing of retaliatory overvaluation:

> "After carefully examining the issue of valuation, the court finds from a thorough review of the legislative history of Section 306 that Congress did not generally intend the courts to examine the issue of the valuation of the railroads in actions brought under Section 306. However, we do believe that the court has jurisdiction to consider a situation where a state attempts to circumvent Section 306 by overvaluing a railroad in retaliation for past relief accorded under Section 306 of the 4-R Act." (Petition for Writ, pp. 31a-32a)

The District Court then found that the railroads' evidence on the retaliatory overvaluation issue was insufficient to show a violation of Section 306:

> "After carefully reviewing the evidence presented in this case, we do not find that the railroads have demonstrated reasonable cause to believe that a violation of Section 306 has occurred on the issue of valuation. The railroads have failed to adequately show that any increase in the valuation of their rail transportation property was due to improper motivation by the defendants." *Id.*

On the question of overvaluation in general, the District Court found that the railroad's property had not been overvalued in any event:

> "Further, even assuming that the court could consider an ordinary overvaluation case under Section 306, we do not find that the railroads have shown that

the defendants overvalued their property under the guidelines established by Kansas law." *Id.*

In its December 9, 1982 memorandum, the District Court amplified its foregoing findings:

> "After carefully considering the evidence on overvaluation, we do not find that the plaintiffs have demonstrated reasonable cause to believe that the defendants retaliated against them for relief received in the 1980 tax case. We reach this conclusion based on several facts adduced during the evidence that was presented. The procedures used by the defendants to arrive at the 1982 unit valuations were identical to the procedures used by the defendants for over ten years to value railroads operating within the State of Kansas. Further, these procedures were identical to those used to value the other railroads within the state of Kansas in 1982. It appears that the railroads have long been dissatisfied with the procedures used by the defendants to value railroad transportation property in Kansas. The procedures utilized in 1982 certainly were not just instituted in order to create a higher value for the railroads. The court found the explanations offered by defendant Martin for the increases in the 1982 valuations of the Burlington Northern plaintiffs to be credible. In sum, we find that the plaintiffs have failed to adequately demonstrate any retaliation by the defendants in their 1982 valuations of the Burlington Northern plaintiffs. Further, even if we were to consider simply the issue of overvaluation, we do not find that the plaintiffs demonstrated reasonable cause to believe that the defendants, under the standards provided under Kansas law, overvalued the plaintiffs' property in 1982. In sum, we refuse to grant any relief to the Burlington Northern plaintiffs

based on alleged overvaluation." (Petition for Writ, pp. 26a-27a)

In its August 23, 1983 opinion, the Tenth Circuit slightly modified the District Court's legal conclusions concerning the breadth of overvaluation issues cognizable under Section 306:

> "The district court declared that it would grant relief under § 306 if the railroad could make a strong showing that state authorities deliberately overvalued the railroads' property in retaliation for past equalization relief the railroads had secured. We agree, but we would hold that a suit can be maintained whenever a railroad can make a strong showing of a purposeful overvaluation of a particular railroad's property with discriminatory intent, whether or not the overvaluation was made in retaliation for other litigation. We emphasize, however, that a strong prima facie case of retaliation or intentional discrimination must be made." (Petition for Writ, p. 6a)

As to the District Court's factual conclusions on the overvaluation issue in general, however, the Tenth Circuit concurred with the lower court:

> "Here, there were substantial increases in the property valuations for most of the railroads involved in this appeal between the 1981 and 1982 tax years. The trial court found, however, that the procedures the state used to arrive at the 1982 unit valuations were identical to those it used over a long prior period and identical to those used to value the properties of the other railroads in Kansas in 1982. We have examined the record and are satisfied that the railroads did not make a sufficient showing of discriminatory overvaluation." *Id.*

REASONS FOR DENYING CERTIORARI

1. The Decisional Bases For The Tenth Circuit's Opinion Were Factual Determinations Applicable Only To Certain Railroads And To This Specific Case.

2. The Railroads Have Adequate State Law Tax Remedies Available For Relief From Overvaluation. They Have Never Used Them.

1.

The decisional bases for the Tenth Circuit's opinion were factual determinations, not legal ones.

Those factual determinations were made upon facts which were unique to the 1982 Kansas 4-R Act case, and which are not typical of the facts generally presented by 4-R Act cases, as a review of the cases cited at footnote 20, page 14 of the petition for writ will show. The uniqueness of the 1982 Kansas case was (a) an increase of the tax assessments for most Kansas railroads in 1982 over 1980-1981 levels, coupled with (b) certain railroads of the Burlington Northern group's claim of retaliatory overvaluation. The likelihood of such factual pattern repeaing, at least often enough to warrant the expression of this Court's concern by granting certiorari, is remote.

The factual determinations which were the decisional bases of the Tenth Circuit's opinion were made in the first instance by the District Court. The District Court made those determinations upon a record of controverted testimony and evidence fashioned out of several days of hearing, a hearing at which valuation experts for the railroads as well as for the State Respondents testified. Petitioners were not denied an opportunity to be heard or to present their evidence on their overvaluation claims.

Petitioners were not motioned out of court before trial nor were any of their overvaluation evidence excluded during trial. Everything that Petitioners wanted to tell the District Court about their overvaluation claims was let into the record. The Tenth Circuit concurred in the District Court's factual findings.

Petitioners do not seek certiorari on those factual determinations made below. They seek certiorari only as to certain legal issues. The legal issues proposed for review did not form any part of the decisional bases of the Tenth Circuit's opinion. No legal issue which is fundamental to Section 306 nor which is significant to the general judicial administration of the 4-R Act formed any part of those decisional bases.

The threshold to any such legal issue in the context of the 1982 Kansas case was insurmountably clogged by the factual overvaluation issue. Whether Section 306 reaches "retaliatory overvaluation" situations, as the District Court held, or whether it reaches "purposeful overvaluation with discriminatory intent" situations, as the Tenth Circuit held, overvaluation must nonetheless be found in the first instance.

The District Court held that Petitioners' evidence failed to demonstrate reasonable cause to believe that the State Respondents, under the standards provided by Kansas law, had overvalued Petitioners' property in 1982. The Tenth Circuit concurred in the District Court's findings. In Rule 17 terms, the Tenth Circuit did not decide an important question of federal law which has not been, but which should be, settled by this Court. Thus, neither lower court based its opinion on any Section 306 legal issue, much less the ones proposed for certiorari. Each court was unable to reach such issue because of the factual impediment of the overvaluation issue. That this Court

would reach such legal issue on the record below is unlikely. Any ruling which this Court were to make on such legal issue would be wholly advisory.

The limited scope of this case in the context of the judicial administration of Section 306 of the 4-R Act is evidenced further by the facts that Petitioners are only five of the six Kansas railroads comprising the Burlington Northern group, all of whose 1982 tax assessments exceeded their 1980-1981 tax assessments, and that Petitioners are only five out of the eleven railroads operating in Kansas, most of whom received such assessment increases.

Legal problems warranting certiorari must be "beyond the academic or episodic". *Rice v. Sioux City Cemetery*, (1954) 349 U.S. 70, 74, 99 L.Ed. 897, 75 S.Ct. 614. Such problems must be important to the public as distinguished from the particular parties involved. *Layne & Bowler Corp. v. Western Well Works*, (1922) 261 U.S. 387, 393, 67 L.Ed. 712, 43 S.Ct. 422; *Rice v. Sioux City Cemetery, supra* p. 79. "We do not grant a certiorari to review evidence and discuss specific facts". *United States v. Johnston*, (1924) 268 U.S. 220, 227, 69 L.Ed. 925, 45 S.Ct. 496. Certiorari is not granted in cases where ". . . all that is involved is an appraisal of the fair inferences to be drawn from the evidence." *Dick v. New York Life Ins. Co.*, (1959) 359 U.S. 437, 3 L.Ed.2d 935, 79 S.Ct. 921, Mr. Justice Frankfurter's dissent pp. 455-456. This Court does not generally grant certiorari as to factual issues where the District Court's factual findings have received the concurrence of the Court of Appeals. *Graver Mfg. Co. v. Linde Co.*, (1948) 336 U.S. 271, 275, 93 L.Ed. 672, 69 S.Ct. 535; *Berenyi v. Immigration Director*, (1967) 385 U.S. 630, 635, 17 L.Ed.2d 656, 87 S.Ct. 666. All these principles are applicable to the instant petition for writ.

2.

The railroads have adequate state law tax remedies available for relief from overvaluation. They have never used them.

Railroads in Kansas are assessed by the Department of Property Valuation ("DPV"). K.S.A. 79-5a01 and K.S.A. 1982 Supp. 79-5a01. At any time before a railroad's assessed valuation is finally determined, the railroad has the right to appear and to be heard by the DPV concerning the appraised valuation of its property. At any time before certification of the assessed valuation to the counties, the DPV may correct any valuation that will make it more just and equal. K.S.A. 79-5a05, reprinted as Appendix A hereto. If a railroad is dissatisfied with the DPV's final assessment, it can appeal to the Kansas Board of Equalization (the "BTA"). K.S.A. 79-2438, reprinted as Appendix "B" hereto. A railroad may also pay its taxes under protest and apply to the BTA for the refund of the protested portions of those taxes. K.S.A. 79-2005 and K.S.A. 1982 Supp. 79-2005, the latter being reprinted as Appendix "C" hereto.

If a railroad is dissatisfied with any final order of the BTA, it may seek relief in state court. K.S.A. 74-2425, reprinted as Appendix "D" hereto. Relief will be granted by the state court if the BTA's order is found to be unreasonable, arbitrary or capricious. K.S.A. 79-2426(e). The grant of relief on these limited grounds is consistent with and dictated by federal and state constitutional doctrines of the separation of the powers of the legislature (i.e.: the taxing authority) from those of the judiciary:

> "Federal courts may not assess or levy taxes. Only the appropriate taxing officials of Grant County may assess and levy taxes on these leaseholds, and the federal courts may determine, within their jurisdiction, only whether the tax levied by those officials

is or is not a valid one." *Moses Lake Homes v. Grant County,* (1961) 365 U.S. 744, 6 L.Ed.2d 66, 71, 81 S.Ct. 870.

"Matters of assessment and taxation are administrative in their character and not judicial, and an interference by judges who are not elected for that purpose with the discharge of their duties by those officers who are invested with the sole authority to make and estimate value is unwarranted by the law. The district court could not substitute its judgment for that of the board of equalization, and this court cannot impose its notion of value on either. These are fundamental principles in the law of taxation and cannot be waived aside to meet the exigencies of any particular case . . .

"But fraud, corruption and conduct so oppressive, arbitrary or capricious as to amount to fraud, will vitiate any official act, and courts have power to relieve against all consequential injuries. In every case, however, the departure from duty must be shown by the party seeking redress to fall within the well-defined limits of the powers of a court of equity." *Symns v. Graves,* (1902) 65 Kan. 628, 636, 70 Pac. 591. (Citations omitted).

See also *Garvey Grain, Inc. v. MacDonald,* (1969) 203 Kan. 1, 453 P.2d 59; *Mobil Oil Corporation v. McHenry,* (1969) 200 Kan. 212, 227-232, 436 P.2d 982; *Hanzlick v. Republic County Comm'rs,* (1939) 149 Kan. 667, 88 P.2d 1111; *Builders, Inc. v. Board of County Commissioners,* (1963) 191 Kan. 379, 381 P.2d 527; *Board of County Commissioners v. Brookover,* (1967) 198 Kan. 70, 422 P.2d 906; *Mobil Pipeline Co. v. Rohmiller,* (1974) 214 Kan. 905, 522 P.2d 923.

The railroads did not invoke any of these remedies or procedures, other than to confer with the DPV, in 1980, 1981, 1982 nor in any of the several preceding years.

CONCLUSION

The Tenth Circuit's opinion was not based upon the legal questions proposed for certiorari, nor upon the basis of any legal issue of general importance to the judicial administration of Section 306 of the 4-R Act. The decisional bases of that opinion were factual determinations made after hearing and upon conflicting evidence, and which are applicable to only some Kansas Railroads and to only the 1982 Kansas 4-R Act case. The County Respondents request that this Court deny the petition for writ.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

KSA 79-5a05

79-5a05. Same; right to hearing on appraised valuation; correction of valuation. At any time before the assessed valuation of public utility property is finally determined, the public utility shall have the right to appear and be heard by the director in the matter of the appraised valuation of that utility's property. At any time before certification of the assessed valuation to the counties, the director may correct any valuation that will make it more just and equal.

APPENDIX "B"

KSA 74-2438

74-2438. Appeals to state board; notice and hearing. An appeal may be taken to the state board of tax appeals from any finding, ruling, order, decision, or other final action on any case of the director of taxation or director of property valuation by any person aggrieved thereby. Notice of such appeal shall be filed with the secretary of the board within thirty (30) days after such finding, ruling, order, decision, or other action on a case, and a copy served upon the director concerned. The board shall fix a time and a place for hearing said appeal, and shall notify the appellant or his attorney of record at least five (5) days prior to the date of said hearing.

APPENDIX "C"

KSA 1982 Supp. 79-2005

79-2005. Protesting payment of taxes; written statement of grounds; proceedings for recovery of protested taxes; limitations; refund of protested taxes; taxing districts authorized to issue no-fund warrants; levy of taxes for payment of no-fund warrants; levy exempt from tax lid. (a) Any taxpayer, before protesting the payment of such taxpayer's taxes, shall be required, either at the time of paying such taxes, or, if the whole or part of the taxes are paid prior to December 20, no later than December 20, to file a written statement with the county treasurer, on forms approved by the director of property valuation and provided by the county treasurer, clearly stating the grounds on which the whole or any part of such taxes are protested and citing any law, statute or facts on which such taxpayer relies in protesting the whole or any part of such taxes.

(b) If the grounds of such protest shall be that the valuation or assessment of the property upon which the taxes so protested are levied is illegal or void, such statement shall further state the exact amount of valuation or assessment which the taxpayer admits to be valid and the exact portion of such taxes which is being protested.

(c) If the grounds of such protest shall be that any tax levy, or any part thereof, is illegal, such statement shall further state the exact portion of such tax which is being protested.

(d) Upon the filing of a written statement of protest, the grounds of which shall be that any tax levied, or any part thereof, is illegal, the county treasurer shall mail a copy of such protest to the governing body of the taxing district making the levy being protested.

(e) Within 30 days after filing the written statement of protest, the protesting taxpayer must file an application for refund with the state board of tax appeals, on forms approved by the state board of tax appeals and provided by the county treasurer, together with a copy of the written statement of protest.

(f) Upon receipt of the application for refund, the board shall docket the same and notify the taxpayer and the county treasurer of such fact. In addition thereto if the grounds of such protest is that the valuation or assessment of the property is illegal or void the board shall notify the county appraiser thereof.

(g) After examination of the application for refund, the board shall fix a time and place for hearing, unless waived by the interested parties in writing, and shall notify the taxpayer and the county treasurer of the time and place so fixed. The county treasurer shall then notify the clerk, secretary or presiding officer of the governing body of any taxing district affected by such application for refund, of the time and place for hearing. In addition thereto if the grounds of such protest is that the valuation or assessment of the property is illegal or void the board shall notify the county appraiser thereof.

(h) In the event of a hearing, the same shall be originally set not later than 90 days after the filing of the application with the board.

(i) When a determination is made as to the merits of an application for refund, the board shall enter its order thereon and give notice of the same to the taxpayer, county treasurer, county appraiser, county attorney, county counselor and the appropriate taxing districts, by mailing to each a certified copy of its order. The date of an order, for purposes of filing an appeal to the district court, shall be the date of certification.

(j) If a protesting taxpayer fails to file such application for refund with the board within the time limit prescribed, such protest shall become null and void and of no effect whatsoever.

(k) In the event the board orders that a refund be made and no appeal is taken from such order, the county treasurer shall, as soon thereafter as reasonably practicable, refund to the taxpayer such protested taxes from tax moneys collected but not distributed. Upon making such refund, the county treasurer shall charge the fund or funds having received such protested taxes.

(l) Whenever, by reason of the refund of taxes from any fund, it will be impossible to pay for the imperative functions of such fund for the current budget year, the governing body of the taxing district affected shall issue no-fund warrants in an amount necessary to pay such refund. Such warrants shall conform to the requirements prescribed by K.S.A. 79-2940, and amendments thereto, except they shall not bear the notation required by such section and may be issued without the approval of the state board of tax appeals. The governing body of such taxing district shall make a tax levy at the time fixed for the certification of tax levies to the county clerk next following the issuance of such warrants sufficient to pay such warrants and the interest thereon. All such tax levies shall be in addition to all other levies authorized or limited by law and the tax levy limitations imposed by article 19 of chapter 79 of the Kansas Statutes Annotated, and amendments thereto, and K.S.A. 79-5001 to 79-5016, inclusive, and amendments thereto, shall not apply to such levies.

(m) The county treasurer shall disburse to the proper funds all portions of taxes paid under protest and shall maintain a record of all portions of such taxes which are so protested and shall notify the governing body of the

taxing district levying such taxes thereof and the director of accounts and reports if any tax protested was levied by the state.

(n) This statute shall not apply to the valuation and assessment of property assessed by the director of property valuation and it shall not be necessary for any owner of state assessed property, who has an appeal pending before the board of tax appeals, to protest the payment of taxes under this statute solely for the purpose of protecting the right to a refund of taxes paid under protest should that owner be successful in that appeal.

APPENDIX "D"

KSA 74-2426

74-2426. Final orders of board; rehearings; appeals to district and appellate courts; procedure and jurisdiction. (a) Whenever the board of tax appeals shall enter its final order on any appeal or in any proceeding under the tax protest, tax grievance, tax exemption statutes or any original proceeding before the board other than the above cases said board shall make written findings of fact forming the basis of such determination and final order and such findings shall be made a part of such final order. The board shall mail a copy of its final order to all parties to the proceeding within ten days following the certification of the order. The appellant or applicant and the county appraiser shall be served by restricted mail.

(b) (1) No appeal shall be taken from a final order of the board unless the aggrieved party shall have first filed a motion for rehearing of that order with the board and the board shall have granted or denied the motion for rehearing, or thirty days shall have lapsed from the filing of that motion with the board, from which it shall

be presumed that the board has denied the motion. Any order issued by the board following a rehearing shall become the final order of the board.

(2) Within thirty days following the certification of any final order of the board, on such motion for rehearing, any aggrieved party in such appeal or proceeding may appeal to the district court of the proper county.

(3) No appeal shall be taken from any order of the board in a no-fund warrant proceeding issued pursuant to K.S.A. 12-110a, 12-1662 *et seq.*, 19-2752, 75-4361, 79-2938, 79-2939, 79-2951 and statutes of a similar character.

(4) This statute shall be exclusive in determining appeals taken from all decisions of the board of tax appeals after the effective date of this act and shall exclusively govern the procedure to be followed in taking any appeal from the board of tax appeals from and after such date.

(c) (1) Appeals shall be taken by filing, with the clerk of the district court of the proper county within thirty days of the certification of the board's order to the party, a written notice stating that the party appeals to the district court, and alleging the pertinent facts upon which such appeal is grounded. Upon filing of the notice of appeal, the clerk of the district court shall docket the cause as a civil action, and shall forthwith and without praecipe, issue summons and cause the same to be served upon all parties involved in the appeal to the board of tax appeals, in accordance with the manner now provided by law in civil cases. The appellant shall also, within ten days of the filing of the notice of appeal, request in writing that the board of tax appeals certify the record of the proceedings before the board to the district court. If a hearing was held before the board the appellant shall also

request, at the same time, that a transcript of that hearing be prepared and shall advance the costs of said transcript. Upon completion of said transcript the board of tax appeals shall certify the record and transcript of proceedings before the board to the district court in which the appeal has been filed.

(2) Jurisdiction to hear and to determine such appeals is hereby conferred upon the district courts of this state. Such an appeal shall not be heard as a trial *de novo* but shall be limited to the transcript of the board and any other public records of which the board can be held to have taken notice.

(3) Appeals may be taken from the district court to the appellate courts by any party to the appeal as in civil cases, except that neither the director of property valuation nor the director of taxation shall be required to give bond on appeal. The final decision made in such appeals may be entered as a judgment as in other civil cases for or against the party appealing.

(d) (1) Appeals from orders of the board relating to excise taxes, including, but not by way of exclusion, income taxes, and from orders relating to the taxation of legacies and successions shall be to the district court of the county in which the appellant-taxpayer resides or the county in which the estate is being administered. If the appellant does not reside in Kansas or the estate is not being administered in Kansas the appeal shall be to the district court of any county where real estate belonging to the estate is located or in Shawnee county. At the time the appeal involving excise taxes or the legacies and successions taxes is filed, the party appealing, excluding the director of taxation, shall give bond for costs in the amount of one hundred twenty-five percent of the amount of taxes assessed, or such lesser amount that shall be approved by

the district court, conditioned that appellant shall prosecute the appeal without delay and pay all costs assessed against the appellant.

(2) Appeals from orders made by the board of tax appeals relating to the valuation or assessment of property for ad valorem tax purposes or relating to the tax protest, shall be to the district court of the county in which the property is located, or if located in more than one county, then to the district court of any county in which any portiton of the property is located. Orders pertaining to state assessed property, appraised and assessed by the director of property valuation, shall be appealed to the district court of Shawnee county. In orders relating to tax exemption under K.S.A. 79-201 *et seq.* the appeal shall be filed in the district court of Shawnee county. In the event the appeal is by a party other than the director of property valuation or any taxing subdivision, and is from an order determining, approving, modifying, or equalizing the amount of valuation assessable, and of which the tax has not been paid, a bond shall be given in the amount of one hundred twenty-five percent of the amount of the taxes assessed or such lesser amount as shall be approved by the district court, conditioned that appellant shall prosecute the appeal without delay and pay all costs assessed against the appellant.

(e) No appeal may be taken to the district court from any order determining, approving, modifying, or equalizing the assessment of property for ad valorem tax purposes unless such order is unreasonable, arbitrary or capricious. Such actions shall be heard by the court at the earliest possible date and shall be entitled to preference upon the calendar of the court over all other actions except cases of a like character, and criminal cases.

(f) The district courts of this state and its appellate courts shall have jurisdiction to hear and determine any appeals, or purported appeals, which may have been dismissed after January 1, 1980, but before the effective date of this act, from final orders of the board of tax appeals concerning tax protests, tax grievances tax exemption statutes or original proceedings before the board under the provisions of K.S.A. 1980 Supp. 60-2101, subsections (a), (b) and (d), or any of their statutory predecessors, under the provisions of K.S.A. 74-2426, or any of its statutory predecessors, or under the provisions of K.S.A. 1980 Supp. 79-2005, or any of its statutory predecessors. Such jurisdiction shall be exercised by the courts in all cases where such appeals, or purported appeals, have not been finally disposed of either (1) upon the merits thereof or, (2) for lack of substantial compliance with the requirements for appeal under the statutes mentioned above or (3) upon some grounds other than the dismissal thereof on the basis of the purported lack of any appellate jurisdiction over such appeal. Any appeal or purported appeal from such final order of the board under any of the statutes mentioned above which may have been dismissed, or which may hereafter be dismissed, by a district court or appellate court on the basis that the statutes mentioned above, or any of them, did not apply to such appeal, shall be reinstated before such court immediately upon the request of any party to such appeal, and the courts shall thereafter exercise further appellate jurisdiction over such appeal in the same manner and to the same extent as if such appeal had not been dismissed.